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No. 724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

AUCLAIR TRANSPORTATION, INC., *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM.

WILLIAM J. TAYLOR,
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INDEX.

	PAGE
Statement	1
Argument	4
Conclusion	18
Certificate of Service	19

Citations.

Cases: PAGE

American Trucking Associations, Inc. v. *United States*, 355 U. S. 141 (1957) 5, 6, 9
American Trucking Associations, Inc. v. *United States*, 364 U. S. 1 (1960) 5, 7, 9
Arrow Transportation Company v. *Southern Railway Company*, 372 U. S. 658 (1963) 11
Interstate Commerce Commission v. *The New York, New Haven and Hartford Railroad Co.*, 372 U. S. 744 16
Mistletoe Express Service, Extension—Texas, 61 M. C. C. 737 (1953) 14
Railway Express Agency, Incorporated, Applications, MC 66562 and Subs 1-181 3
Railway Express Agency, Inc., Extension—Cheneyville, Ill., MC 66562, Sub 1069 11
Railway Express Agency, Inc.—Cincinnati, Ohio and Connersville, Indiana, MC 66562, Sub 733 10
Railway Express Agency, Inc., Extension—Deadwood, South Dakota, MC 66562, Sub 972 11
Railway Express Agency, Incorporated, Extension—Nashua, N. H., 91 M. C. C. 311 2
Railway Express Agency, Inc., Extension of Operations—Williamsport—Elmira, 26 M. C. C. 747 10
Railway Express Agency, Inc., Extension of Operations—Washington—Harrisonburg, 33 M. C. C. 671 (1952) 10
Railway Express Agency, Inc., Extension—Harrisburg and Hagerstown, MC 66562, Sub 964 11
Railway Express Agency, Inc., Extension—Kenosha-Twin Lakes, 31 M. C. C. 587 (1942) 14
Railway Express Agency, Inc., Extension—Lima, Ohio and Frankfort, Ind., MC 66562, Sub 1013 11
Railway Express Agency, Inc., Extension—Millville, N. J., MC 66562, Sub 1156 11

PAGE

Railway Express Agency, Inc., Extension of Operations—Newport, R. I., 31 M. C. C. 689 11

Railway Express Agency, Inc., Extension—Parkersville, Va., MC 66562, Sub 1085 11

Railway Express Agency v. United States, 153 F. Supp. 738, 741 (1957); aff'd 355 U. S. 270 15

Railway Express Agency, Inc., Extension—West Unity-Middletown, 31 M. C. C. 363, 371 (1941) 14

Railway Express Agency, Inc., Extension—Wheeling, W. Va., MC 66562, Sub 1311 11

Railway Express Agency, Inc., Extension—York, Pa., MC 66562, Sub 905 10

Railway Express Agency, Inc., Extension—Youngstown, Ohio, MC 66562, Sub 865 10

STATUTES:

28 U. S. C. 2284 and 2325 1

28 U. S. C. 2323 1

Interstate Commerce Act,

Section 1 *et seq.*, 49 U. S. C. Section 1 *et seq.* 15

Section 5(2)(b), 49 U. S. C. Section 5(2)(b) 4, 5, 9

Section 205(a), 49 U. S. C. Section 305(a) 2

Section 206, 49 U. S. C. Section 306 3

Section 207, 49 U. S. C. Section 307 5

Section 210a, 49 U. S. C. Section 310a 2

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM.

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, Railway Express Agency, Incorporated (hereinafter called R E A Express), appellee, moves that the judgment of the district court be affirmed.[1]

Statement.

This is a direct appeal from a final judgment entered on September 11, 1963, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325 dismissing appellants' complaint which sought to set aside an order of the Interstate Commerce Commission. R E A Express was a party to the proceeding before the Commission and was permitted to intervene as a party defendant before the district court pursuant to the provisions of 28 U. S. C. 2323.

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[1] The Opinion of the district court is reported at 221 F. Supp. 328.

The Report and Order of the Interstate Commerce Commission,[2] which is the subject of this appeal, embraces five separate applications by R E A Express to operate as a common carrier by motor vehicle, in interstate and foreign commerce, over specified routes in the New England area, serving some 34 points in the States of Massachusetts, New Hampshire and Vermont, connecting with other already established motor vehicle routes serving the States of Maine and New York (J. S. 41; 91 M. C. C. 312).

R E A Express applied for and received temporary authority pursuant to Section 210a of the Interstate Commerce Act, 49 U. S. C. 310a, to operate the routes in question pending a final determination of these proceedings (Subs 1498TA, 1560TA, 1571TA, 1572TA, 1575TA, and 1683TA). Subsequently five applications for permanent authority were filed and heard separately. Each was the subject of a favorable report by either a Joint Board[3] or a Hearing Examiner. Upon exceptions by the present appellants, three of the applications (Sub Nos. 1577, 1594 and 1595) were the subject of a unanimous favorable report and order by Division 1 of the Commission (J. S. 102). These three applications, plus Sub Nos. 1515 and 1687, were then heard by the entire Commission and were the subject of the unanimous report and order here under attack. Finally, the Commission's order was reviewed by a three-judge court which unanimously affirmed the Commission decision.

The applications here under review were necessitated by changing technology in transportation. The express busi-

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[2] *Railway Express Agency, Incorporated, Extension—Nashua, N. H.*, 91 M. C. C. 311.

[3] Joint Boards are made up of representatives of the states through which the proposed routes will operate and are established pursuant to 49 U. S. C. 305(a).

ness began 125 years ago, moving by boat from Boston, Massachusetts, to Providence, Rhode Island, and on to New York by train. It grew rapidly, expanding to the West by use of stage coach and pony express. With the development of the fast passenger train, in the late 19th and early 20th centuries, this became the dominant method of line-haul movement. The development of air service gave rise to air express which continues to be a flourishing part of R E A's business.

In the 1930's, and progressing even more rapidly in recent years, the disappearance of passenger train service has made it increasingly necessary for R E A Express to seek and obtain operating authority from the Interstate Commerce Commission to operate its surface line-haul service by motor vehicle in order that it might continue to offer the public the type of service which it requires and to which it is entitled. In fact, when Part II of the Interstate Commerce Act was enacted in 1935, R E A Express was already operating some 250 motor carrier routes in lieu of discontinued rail service. It applied for and received "grandfather" certificates pursuant to Section 206 of the Motor Carrier Act. 49 U. S. C. Section 306.[4] The discontinuance of passenger train service in the New England area forced R E A Express to seek authority to operate motor vehicles over the routes here in question so that the New England area might continue to have express service available as a part of its transportation system.

Solely because the capital stock of R E A Express is owned by some 60 railroads, appellants would have this Court declare that any certificate of public convenience and necessity issued to R E A Express for over-the-highway

[4] *Railway Express Agency, Incorporated, Applications*, MC 66562 and Subs 1-181.

operation must contain a restriction which would require that all traffic handled have an immediately prior or subsequent movement by rail. Since the very reason for the applications in the first place is the disappearance of rail passenger service, it is quite obvious that appellants' contention, if upheld, would drive out of existence a transportation company which has been providing a needed service to the public from the stage coach to the jet age. It is indeed ironic that appellants seek to destroy express service, which is in some respects a competitor, by relying upon Section 5(2)(b) of the Interstate Commerce Act, 49 U. S. C. 5(2)(b)—a section clearly designed to foster and preserve competition. Both the Commission and the district court correctly declined to be parties to so obvious a distortion of congressional policy.

Argument.

1. This appeal presents no substantial question warranting plenary review by this Court. There can be no doubt that the district court correctly concluded that the Commission acted within its statutory authority as interpreted by this Court on many occasions. Perhaps the best evidence of this fact appears from appellants' own statement of Questions Presented. The very first question assumes a state of facts which is at odds with the record in this proceeding, at odds with the findings and conclusions of the Commission, and at odds with the conclusions of the district court. In short, while it may be interesting to speculate "whether the Interstate Commerce Commission, in the absence of 'special circumstances' . . . may authorize Railway Express Agency, Inc., . . . to conduct motor common carrier operations not restricted to traffic having an immediately prior or subsequent movement by rail," such speculation has nothing to do with the issues presented by this case. Both the district court and the Commission

have specifically found "special circumstances" and having so found, there can be no further question that the result reached by the Commission in this proceeding is well within the discretion vested in it by Congress. *American Trucking Associations, Inc.* v. *United States*, 355 U. S. 141 (1957); *American Trucking Associations, Inc.* v. *United States*, 364 U. S. 1 (1960).

Appellants' Jurisdictional Statement attempts to create the impression that the Commission in this proceeding has treated R E A Express differently from other rail-affiliated motor carriers. The fact is that the Commission specifically refused to treat R E A differently even though, in the light of history and the purpose of Section 5(2)(b) of the Interstate Commerce Act (49 U. S. C. 5(2)(b)) it would appear that stock ownership by some 60 railroads is far different from the type of control Congress had in mind when it enacted that section. For purposes of this case, R E A Express has not contested the finding that it is "affiliated with the railroads within the meaning of Section 5(2)(b)."

Appellants themselves acknowledge that this Court has clearly held in the *American Trucking Associations* cases, *supra*, that the mere finding that R E A Express is an affiliate of the railroads does not in any way preclude the Commission from granting it operating rights under Section 207 of the Act (49 U. S. C. 307). At page 9 of the Jurisdictional Statement appellants say:

> "The one exception to the rule against Commission approval of unrestricted motor-carrier operations by a railroad or a railroad affiliate is the 'special circumstances' test, and what constitutes such special circumstances is spelled out in *Rock Island M. Transit Co. Com. Car. Application*, 63 M. C. C. 91, 102 (1954), aff'd 355 U. S. 141 (1957): To receive unrestricted authority, the rail affiliate must not only

> establish that the grant of authority has not and will not result in undue restraint of competition, but it must also prove 'that public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience.' "

What appellants refuse to acknowledge is the undisputable fact that this case comes squarely within the stated exception. The Commission found, upon substantial evidence, that none of the appellants renders a service comparable to that of R E A Express and that there is a substantial public need for the continuation of such service. The district court, after a thorough review of the record, reached the same conclusion (J. S. 36). Under the clear pronouncements of this Court, having made such findings there can be no doubt that the Commission was well within its discretion when it issued the certificates in question.

In *American Trucking Associations* v. *United States*, 355 U. S. 141, the Commission issued an unrestricted certificate to Rock Island Motor Transit, a wholly-owned subsidiary of the Chicago, Rock Island and Pacific Railroad. The American Trucking Associations sought review of the Commission decision. The major ATA argument was precisely the one now reiterated by the same party in the Jurisdictional Statement in this case, i.e., that motor carrier operations of rail affiliates must be limited to those usable to public advantage in their rail service. This Court rejected that argument and held that (355 U. S. 151):

> "We repeat . . . that the underlying policy of Section 5(2)(b) must not be divorced from proceedings for new certificates under Section 207. Indeed the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.' *But, for reasons we have stated, we*

> *do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a Section 207 proceeding.*" (Emphasis supplied.)

The Jurisdictional Statement in this case reveals appellants' obvious intent to re-argue the identical proposition that this Court flatly and unmistakably rejected when advanced by one of the same plaintiffs in the cited case.

In *American Trucking Associations v. United States*, 364 U. S. 1 (1960), after quoting the paragraph set forth above, the Court said (at page 11):

> "These, then, are the guiding principles which have been established by what has gone before and which mark the range of our inquiry in this case."

The Court found in the latter case that the Commission had failed to find "special circumstances" sufficient to meet the statutory test. In explaining the type of "special circumstances" required, the Court said (at pages 14, 15):

> "There is, for example, no finding that independent contract carriers were unable or unwilling to perform the same type of service as Pacific Motor."

2. In the instant case the Commission found precisely the conditions which this Court specifically held would constitute "special circumstances" but appellants steadfastly refuse to recognize this fact. Instead they argue that the district court erred when it concluded that the Commission did in fact find, upon substantial evidence, special circumstances. Thus appellants find themselves in the peculiar position of arguing that the Commission must find "special circumstances" and then attempting to explain away the fact that the Commission made precisely such a finding.

The difficulty in which appellants find themselves is that their effort to conjure up some issue worthy of plenary review by this Court requires that they attempt to ignore the clear language of the Commission's report. The report takes special note of the interpretation placed on the statutes by both itself and the Courts and finds specifically that existing motor carriers are in fact unable or unwilling to perform the type of service rendered by R E A Express. The Commission said (J. S. pages 83, 86; 91 M. C. C. at pages 340, 341, 342):

> ". . . because the express company is affiliated with the railroads within the meaning of section 5(2)(b), we believe that special circumstances must exist in order for R E A to obtain a certificate authorizing motor vehicle operations wholly disassociated from rail operations. However, we are convinced that where the existing motor carriers are not rendering regularly an express service, special circumstances do, in fact, exist.
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> ". . . In each proceeding there are one or more protestants authorized to serve all of the points involved on one or both of the segments. All such carriers, however, hold authority restricted against the transportation of commodities of unusual value, *and thus are unable to perform the complete service shown to be required.* More important, though, is the fact that *none of these protestants renders regularly an express service;* for if they do, they have failed to so indicate on these records. Applicant, under temporary authority and before that in connection with passenger train operations, has been providing express service at the communities involved in both of these applications. Were protestants able to show that at any time they were effectively competing for and transporting express traffic, we might be able to accept their argument now that they are interested in and capable of doing so. But absent

> such proof, *we must view the evidence as supporting the conclusion that the protestants do not render regularly any express services.* In light of the need established for such services, the applications should be granted." (Emphasis supplied.)

How appellants can continue to assert that the Commission failed to find "special circumstances" in the face of this language is a mystery. The fact is that, notwithstanding a finding of "special circumstances," the Commission did not issue *unrestricted* certificates as contemplated in the two *American Trucking Associations* cases, *supra*. On the contrary it has specifically restricted the certificates to the type of service for which a need has been shown, i.e., express service.

Not only are the operating authorities subject to severe limitations designed to insure that they will be used only for carrying on an express business, but, in addition, as appears from restriction No. 4 (J. S. 89), the Commission has reserved the right to impose even further restrictions if the need should arise. It is obvious that the Commission did not begin to approach the limit of its authority as established by this Court. On the contrary, a denial of the applications would have been directly contrary to established congressional policy as declared both in the National Transportation Policy and in the provisions of the Interstate Commerce Act itself. This is especially true where, as here, the alleged congressional policy upon which appellants would have the Court rely to drive R E A Express out of existence is drawn from Section 5(2)(b)—a statute which was enacted to insure that competition in transportation would be preserved.

3. Appellants, not satisfied with the very limited authority granted herein, sought to have the courts substitute

their judgment for that of the Commission and require the Commission to impose an additional restriction which would limit the traffic handled over the routes in question to that which would receive a prior or subsequent movement on steel rails. The district court properly declined to do so. Since the very reason for the applications in the first place was the rapid disappearance of passenger train service in New England, the court observed that this additional restriction would be tantamount to putting R E A Express out of business and depriving the shippers of the very service for which a specific need had been found (J. S. 36, 37).

Appellants suggest that the omission of a so-called rail-haul limitation is a radical departure from past Commission practice in certificates issued to R E A Express. This is not a fact. As the Commission observes at page 39 of its report (91 M. C. C. at page 332), "the rail-haul restriction in R E A certificates is utilized simply to reflect the type of need shown in each case for the service proposed." As long ago as 1940, in *Railway Express Agency, Inc., Extension of Operations—Williamsport—Elmira*, 26 M. C. C. 747, the Commission issued operating authority to R E A which omitted any rail-haul restriction. See also *Railway Express Agency, Inc., Extension of Operations—Washington—Harrisonburg*, 33 M. C. C. 671 (1952).

The Commission has continued to omit the rail haul restriction whenever there is evidence that the public need would be frustrated by such a restriction. A few of such cases are cited in the margin.[5]

[5] *Railway Express Agency, Inc.—Cincinnati, Ohio and Connersville, Indiana*, MC 66562, Sub 733; *Railway Express Agency, Inc., Extension—Youngstown, Ohio*, MC 66562, Sub 865; *Railway Express Agency, Inc., Extension—York, Pa.*, MC 66562, Sub 905;

In short, the Commission has for many years recognized that the services of R E A Express should not be denied to the shipping public merely because steel rails are not involved in the performance of the service. It has long been held that the courts will not attempt to substitute their judgment for the long-standing exercise of Commission discretion in matters of this kind. The Commission is the body entrusted with the duty to preserve an adequate transportation system to meet the needs of this country. It has spoken. The district court has affirmed. The necessary steps to protect all of the legitimate interests have been taken. Appellants have failed in their efforts to impose conditions which would surely destroy express service. This Court has very recently pointed out that it is for the Commission, not the courts, ". . . to achieve a balance between the competing forms of transportation." *Arrow Transportation Company v. Southern Railway Company*, 372 U. S. 658.

4. Appellants' Question No. 4 again assumes a conclusion which is foreign to this case. It asserts that the Commission refused "to apply its long-standing definition of 'express service' to the proposed service." Nothing could be further from the fact. The Commission reviewed its long-standing definition of express service as developed in a long line of cases (J. S. 17, 91 M. C. C. 311 at 322) and

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Railway Express Agency, Inc., Extension—Harrisburg and Hagerstown, MC 66562, Sub 964; *Railway Express Agency, Inc., Extension—Deadwood, South Dakota*, MC 66562, Sub 972; *Railway Express Agency, Inc., Extension—Lima, Ohio and Frankfort, Ind.*, MC 66562, Sub 1013; *Railway Express Agency, Inc., Extension—Chenoaville, Ill.*, MC 66562, Sub 1069; *Railway Express Agency, Inc., Extension—Purcellville, Va.*, MC 66562, Sub 1085; *Railway Express Agency, Inc., Extension—Millville, N. J.*, MC 66562, Sub 1156; *Railway Express Agency, Inc., Extension—Wheeling, W. Va.*, MC 66562, Sub 1311; *Railway Express Agency, Inc., Extension of Operations—Newport, R. I.*, 31 M. C. C. 689.

concluded that there was no need to attempt to establish a new definition at this time. Having so concluded, the Commission then turned to the testimony in this record and determined that the evidence proved overwhelmingly that a public need exists for express service and that, if the service of R E A Express were to be discontinued in the territory involved, that public need would not be filled.

Appellants' argument that the Commission did not properly apply the definition is nothing more than an argument that the Commission's finding is not supported by substantial evidence. The district court recognized the utter futility of this argument in the face of the voluminous evidence in this record. The court said (J. S. pages 30, 31):

> "At oral argument the plaintiff motor carriers indicated that their quarrel was not with this definition, which has long been well-recognized in the transportation industry, see Transportation Activities of Arrowhead Freight Lines, 63 M. C. C. 573 (1955), but with the Commission's finding that the evidence showed a public need for such service. This argument was made in the face of voluminous evidence that there is such a need. . . ."

Indeed the evidence is not only voluminous, it is overwhelming in support of the Commission's finding of a public need. The characteristics of the need which express service fills are neither vague nor uncertain in this record. They are characteristics which have been a part of express service since its inception. They include such attributes as speed, protection, regularity, extreme care, special services such as re-icing, armed guard, armed surveillance, care of live animals, pickup and delivery from homes and places of business no matter whether the shipment be a small package or many hundreds of pounds, and no matter

whether the location be a college on the edge of town, an industry in the middle of town, or a lobsterman's wharf. No other carrier in existence has undertaken to provide the type of specialized service which is the everyday practice of R E A Express. The Commission so found and there is not a scintilla in this record to contradict that finding (J. S. page 84, 91 M. C. C. at page 340). No other carrier, including those who are individual appellants here and those who are members of the American Trucking Associations, has shown any willingness to meet the public need now met by R E A Express. Even the witnesses supplied by appellants admitted that they did not perform the same service as that offered by applicant. The testimony of one such witness was summarized by the Commission as follows (J. S. at page 51, 91 M. C. C. 319):

> "... Dubrey concedes that R E A performs generally a service which it is not accustomed to rendering, and that, while some shippers utilize both its service and that of R E A, the traffic handled by R E A is not the type which it, Dubrey, usually transports. Dubrey opposes the application in order to obtain any additional traffic within the purview of its authority."

When stripped of all window dressing, appellants' efforts in this case are quite obviously directed to the goal of skimming off whatever desirable traffic they might find in the traffic now being handled by R E A Express and permitting the public to fend for itself in the movement of traffic not regarded as desirable by the motor carrier industry. This aim is never more clear than when appellants turn to the argument that R E A's *rates* should have been considered by the Commission in determining whether there is a public need for R E A's *service*. The mere statement of the prop-

osition is it own refutation. What the argument amounts to is a contention that the Commission, having found R E A's service to be a service different from that of the motor carriers, and having found a public need for such service, should then refuse to grant a certificate to perform the needed service because it appears that the applicant may not charge the public a high enough rate for the service performed. The fallacy in this reasoning has been consistently recognized by the Commission and the courts for many years.

The efforts of motor carriers of freight to inject rate comparisons into express certificate cases began as long ago as 1941 when R E A Express first applied for motor carrier rights after the enactment of Part II of the Interstate Commerce Act (Act of August 9, 1935, c. 498, 49 Stat. 543). The Commission said:

> "This protestant fears that applicant will invade the field of freight service either directly or indirectly through the manipulation of tariff rates, rules, and regulations. In this connection, we have control over any rates, rules, and regulations which applicant might seek to establish for application on interstate traffic." *Railway Express Agency, Inc., Extension—West Unity—Middletown*, 31 M. C. C. 363, 371 (1941). See also *Railway Express Agency, Inc., Extension—Kenosha-Twin Lakes*, 31 M. C. C. 587 (1942).

In *Mistletoe Express Service—Extension—Texas*, 61 M. C. C. 737 (1953), the Commission said (at page 746):

> "As for exceptants' fear that applicant will invade the field of freight service either directly or indirectly through the manipulation of its rates, suffice it to say that we have control over any rates which applicant might seek to establish for application on interstate traffic and that, moreover, any unauthorized oper-

> ation can be made the subject of a formal complaint and corrective action. Compare *Transportation Activities of Arrowhead Freight Lines*, 61 M. C. C. 131."

The rule has been followed by the Commission throughout literally hundreds of application cases, and the courts have upheld this view, most recently reaffirmed by the district court in this case (J. S. 33). See also *Railway Express Agency* v. *United States*, 153 F. Supp. 738, 741 (1957); aff'd 355 U. S. 270. Indeed, the rule is so well settled that appellants' counsel did not even attempt to place any rate comparisons in the record in this proceeding until long after the hearings were completed, the record was closed, the initial decisions had been rendered and the matter was before the Commission for oral argument.

The wisdom of the rule is clear and unassailable. The proper level for a carrier's rates in general, or any given rate in particular, is first and foremost a function of the cost of providing that carrier's service to the public. In the case of R E A Express, the level of its rates must properly be considered in the light of the cost of providing the express service which it offers to the public. It would be improper, and directly contrary to the provisions of the Interstate Commerce Act which require the maintenance of reasonable rates by R E A Express (49 U. S. C. Section 1, *et seq.*), if the Commission or the courts were to require express rates to be held at an unnecessarily high level, all factors considered, merely to minimize or eliminate any area of price competition between express carriers and carriers of motor freight. The public is entitled to each carrier's service at a fair price. The Commission is admonished in the National Transportation Policy (49 U. S. C. preceding Section 1):

> ". . . to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . ."

It would be completely at odds with this admonition, and indeed directly contrary to the public interest, if the Commission were to decree in an application case that a condition of rendering the service authorized is that the carrier involved would always be required to charge more than another carrier, irrespective of lower costs, superior management or any one of a number of other attributes which would justify lower rates. No carrier should be required to charge the public a rate well in excess of the carrier's cost of doing business merely to protect another carrier from the effects of competitive forces. Indeed, just such attempts at manipulation of traffic distribution by arbitrary fixing of rate levels has been flatly condemned by this Court as recently as April 22, 1963, in *Interstate Commerce Commission* v. *The New York, New Haven, and Hartford Railroad Co.*, 372 U. S. 744.

The rate proceedings referred to by appellants as presently pending before the Commission (J. S. 21) are themselves evidence that this Court cannot presume to consider the relationship of rates as a relevant matter in an application case. Each of the cases mentioned has involved extensive hearings; large and complex records are before the Commission. Not a single one of them has been finally decided. When the Commission has ultimately determined the right of R E A Express to maintain the rates and to perform the services covered in the tariffs cited, the appel-

lants will have ample opportunity for judicial review if such is desired.

5. Appellants' Question No. 5 again relies upon erroneous assertions of fact in an attempt to present an issue for review by this Court. It is not a fact that the Commission has changed its interpretation of the "rail-haul" restriction "so as to bestow upon Railway Express, as to hundreds of certificates already issued, greatly enlarged operating rights." The fact is that the Commission has never heretofore interpreted the rail-haul restriction contained in certain R E A certificates as preventing a movement over a connecting motor route so long as some rail haul was involved with respect to the traffic moving over such route. Proof of this interpretation is contained in countless connecting certificates which R E A has received where a rail-haul restriction has been included by the Commission notwithstanding the fact that the only route available to reach a railhead was a movement over an existing R E A motor carrier route.[6] The Commission in the instant case was absolutely correct and consistent with prior precedents when it said (J. S. 72; 91 M. C. C. at page 332):

> "In this posture it becomes clear that a normal rail-haul restriction appears in R E A certificates simply because in obtaining its motor carrier authority, R E A showed that the express service to be rendered would be performed as an integrated rail-

[6] E.g. Sub 1431 (Hoosick Falls, N. Y.—North Adams, Mass.) connecting with Sub 1559 (Albany—Hoosick Falls, N. Y.); Sub 1528 (Concord—Ayer, Mass.)—connecting with Sub 1337 (Boston—Concord, Mass.); Sub 1669 (Mooresville—Taylorsville, N. C.)—connecting with Sub 1100 (Charlotte—Mooresville, N. C.); Sub 1680 (Harrisonburg—Bridgewater, Va.)—connecting with Sub 378 (Harrisonburg, Va.—Washington, D. C.); Sub 1753 (Waterville—Pittsfield, Maine)—connecting with Sub 1660 (Pittsfield—Greenville Junction, Maine); Sub 1899 (Aspers—Gardners, Pa.)—connecting with Sub 561 (Gettysburg—Aspers, Pa.).

motor movement; no all-motor movement was contemplated. In that context was the certificate granted, and in that context must the meaning of the restriction be viewed. The usual rail-haul restriction does not contain any specific prohibition against tacking, and we conclude that an R E A certificate containing such a restriction may be joined with other certificates as long as the traffic moved thereunder is not transported in a wholly motor movement. Compare *Transport Corp. of Virginia Extension—Maryland*, 43 M. C. C. 716."

Appellants' assertion that the Interstate Commerce Commission has changed its interpretation of the rail-haul restriction in R E A certificates, which assertion is the whole basis for their Question No. 5, is simply at odds with the facts. It cannot justify reversal by this Court of the lower court's decision. Appellants apparently placed no reliance in this argument in the court below because they made no mention of this alleged error in their requests for findings by the district court.

Conclusion.

For the foregoing reasons, we respectfully submit that the appeal presents no substantial issue warranting further review and that the judgment of the district court should be affirmed.

William J. Taylor,
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February 18, 1964.

Certificate of Service.

I, William J. Taylor, attorney for Railway Express Agency, Incorporated, appellee, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the eighteenth day of February, 1964, I served copies of the foregoing document on the several parties thereto, as follows:

1. On Auclair Transportation, Inc., et al, appellants, by mailing copies in duly-addressed envelopes, with postage prepaid, to Peter T. Beardsley and Richard R. Sigmon, Esqs., 1616 P Street, N. W., Washington 36, D. C., and to Kenneth B. Williams, Esq., 111 State Street, Boston 9, Massachusetts.

2. On the United States, by mailing copies, in duly-addressed envelopes, with postage prepaid, to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., to Robert B. Hummel, Chief, Appellate Section, Anti-Trust Division, Department of Justice, Washington 25, D. C., and to W. Arthur Garrity, Jr., Esq., United States Attorney, 1107 U. S. Post Office & Courthouse Building, Boston 9, Massachusetts.

3. On the Interstate Commerce Commission, by mailing copies in duly-addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and H. Neil Garson, Esq., Associate General Counsel at the Office of the Commission, Washington 25, D. C.

William J. Taylor.